



Mark N. Fox
Office of the Chairman

MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Statement of the Honorable Mark N. Fox, Chairman Mandan, Hidatsa and Arikara Nation

Department of Justice, Department of Interior and Department of Army Improving Tribal Consultation on Infrastructure Decision-Making November 28, 2016

The Mandan Hidatsa and Arikara Nation (MHA Nation) and all tribal governments have a government-to-government relationship with the United States. Most days, we implement our government-to-government relationship through tribal consultation. The health and wellbeing of our government-to-government relationship is measured by how successful and productive tribal consultation is. Looking around Indian Country, I have to say I am very concerned.

Just a few years ago, in 2009, President Obama directed all Federal agencies to update and improve their tribal consultation policies. We are living and working under those policies now. How well are we doing? Across Indian Country I hear about agencies checking the box, ignoring tribal comments and coming to consultation meetings with their minds already made up. What is happening today does not live up to our government-to-government relationship. This is not meaningful consultation.

Just like the Standing Rock Sioux and other Sioux Tribes we have pipelines crossing our lands and threatening our waters. There is one proposed pipeline just upstream from our Reservation and another going straight through the middle of our Reservation. The oil pipeline companies want to cross Lake Sakakawea and the Missouri River, our main water supply and this issue has not been seriously addressed in consultation with the MHA Nation. It is critical that the federal government not grant any permits allowing lake crossings without engaging in proactive meaningful consultation with Tribes whose water sources and other rights are affected.

Recently, and without consultation, a pipeline was drilled under Lake Sakakawea and through the MHA Nation's mineral estate without the MHA Nation's consent—which is required by federal and tribal law. The MHA Nation is now in litigation to protect its sovereign right to prevent the pipeline encumbrance on its trust land. This litigation could have been avoided, and tribal dollars saved, had meaningful consultation occurred, and had the Corps of Engineers solicited our input before granting the right-of-way.

In addition, meaningful consultation would have disclosed significant misstatements in the National Environmental Policy Act (NEPA) document the federal government used to grant a right-of-way through the MHA Nation's trust minerals. The NEPA document didn't even

mention our ownership of the mineral estate under the Lake and also falsely stated that the MHA Nation did not own trust land adjacent to the Lake. Inviting the MHA Nation to comment during the NEPA process through public notices and mailings just like any other person or stakeholder is not enough. Federal agencies need to be proactive in exercising their government-to-government and trust relationship to Tribes, and engage Tribes and Tribal members on their own reservations.

We already sacrificed so much when the Missouri River was dammed and our lands flooded. Our best lands, resources, infrastructure were taken. Now we must live with the ongoing impacts from this flood. It affects every aspect of our lives. We were not consulted then and are not being consulted now.

We don't need you to redo your existing consultation policies. The Obama Administration just did that. We just need you to direct your agencies to follow your existing policies. Agency officials and staff need training and need to be held accountable for incorporating tribal concerns into their final decisions.

The Department of the Interior's policy from 2011 is a perfect example. Just 5 years after the revised policy was issued, I regularly meet with agency officials and staff that do not have any idea about meaningful tribal consultation. Interior's 2011 policy says:

- Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making.
- Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility.
- Communication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process.
- Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices.

Apparently this is not good enough. Your agencies, field offices and staff don't follow these requirements. We need accountability and your staff need training.

Crucial to meaningful consultation under the Policy is early consultation. Interior's Policy requires consulting with Tribes at the "Initial Planning Stage." But, this is not our experience.

In nearly every case, we are brought in after the Initial Planning Stage after crucial project components have already been developed or implemented. Skipping this first stage of consultation renders the rest of the process ineffective and threatens our homelands, waters and resources. Without input at the planning stage, tribal consultation is little more than public notice and comment. Tribes must be allowed input at the initial planning stage. Only then can

the consultation that follows be meaningful.

In addition, for consultation to be effective, field staff must be uniformly trained in the process. As it stands, every agency field office does it differently, and most do not do it well. Tribes don't know what to expect from one field office to the next or from one agency to the next. This makes it difficult for Tribes to provide input when they finally are brought into the process.

Just as with any policy, adequate training is important to effective implementation. Training for tribal consultation should not be an after thought. To reach its full potential, training should contain a cultural component. Without knowledge of the tribal history, culture, and politics, it is difficult, if not impossible, to engage in meaningful consultation.

For these pipelines proposing to cross our waters, the Bureau of Land Management and Army Corps staff working in this area need training and an understanding of our deep bond to the lands and waters of the Missouri River. Without a good understanding of who we are and what we value, how can agencies staff really hear what we are saying? And, how can they know how to use our comments to improve projects to make them better for everyone?

Finally, in many cases, we face so many roadblocks with staff on a personal level we can't even get to meaningful consultation. Agency staff need training and they need to be held accountable for consultation. Only with accountability will your staff find the motivation needed to change and question their personal beliefs that limit consultation and limit the effectiveness of consultation.

The agencies must also be accountable for consultation. Every tribe has a story about consulting with agencies that don't do anything with the information we give them. We spend time and limited resources consulting with agencies and then nothing happens. Nothing changes. Projects move forward as if we did not consult at all.

Agencies need to take the time – and be given the time – to document consultation, make revisions to proposed projects based on consultation, discuss these revisions with tribes, and find a common ground that upholds the federal trust responsibility. Each agency office must be accountable for actually considering the information provided by Tribes. That's consultation. That's the “deliberative process” required by Interior's policy. That is a meaningful government-to-government exchange.

We appreciate your efforts to improve tribal consultation, but there is no need to reinvent the wheel. You all have recently updated policies, just back these policies up with the staff, training and accountability they require. Don't keep creating new paper. Focus on your staff resources and direct your staff to follow the policies already in place.

Our government-to-government relationship is dependent on these staff and whether or not they take meaningful consultation seriously. As leaders of these agencies, they need to know that you will require meaningful, effective and accountable tribal consultation. Our lands, waters, cultural and natural resources depend on meaningful government-to-government

consultation.

We do have success stories and federal agencies should model revision based on these success stories. The MHA Nation worked closely with the Army Corps and Interior for the return of surplus lands around Lake Sakakawea. This effort took more than a decade and we appreciate the hard work and ongoing discussions with federal agency staff that it took to get this done. This was a significant collaborative effort and represents the best of tribal consultation. Consultation is vital to the protection and management of our resources and appreciate your efforts to improve tribal consultation.